SUPREME COURT, U. S.

FILED

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In The

Supreme Court of the United States

October Term, 1961

No. 451

A. RONALD PERKINS, Administrator of the Estate of SUE GARRETT PERKINS, Deceased,

Petitioner,

vs.

WAUKESHA NATIONAL BANK, Individually, and as Trustee, and EDWARD G. BACH, Individually, as Executor of the Estate of ISABEL HADCOCK, Deceased, and as Trustee under the Last Will and Testament of ISABEL HADCOCK, Deceased,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Introduction

It would be difficult to find a case less worthy of the attention of this court than the one here presented.

The real question decided below is one of fact rather than law. The district court so dealt with the case in stating:

"The claim for relief herein is based on the manner in which this fund was invested at the time it was segregated on June 25, 1940."

The Circuit Court of Appeals affirmed the following findings of the District Court:

"13. That it was the intention of the Trustee in reinvesting in the $50,000 secured note of Mrs. Isabel Hadcock on June 25, 1940, to comply with Chapter 320 of the Wisconsin Statutes, and it was the intention of Mrs. Isabel Hadcock to furnish the trustee with security, which was legal for the investment of trust funds under Chapter 320 of the Wisconsin Statutes.

"14. The reinvestment by the trustee in the $50,000 note secured by government bonds on May 15, 1943 and thereafter complied with the requirements of Chapter 320 of the Wisconsin Statutes.

"15. The reinvestments by the trustee were not made in bad faith.

"16. The reinvestments by the trustee were made with the approval and consent of Isabel Hadcock as required by the terms of the trust agreement.

"17. The trustee received no benefit either directly or indirectly from the reinvestments in question.

"18. The agency agreement between the bank and Mrs. Hadcock did not constitute a fraud against the plaintiff.

"19. The reinvestments by trustee exceeded the average yield on legal investments, and the plaintiff suffered no loss or damage as a result of the making of said reinvestments."

Petitioner does not contend in his brief that the findings are unsupported by the evidence. Without alluding to the evidence, he assumes the very fact in issue—*that trust assets which should have been placed in trust for the benefit of the original plaintiffs were exchanged for improper trust fund investments.* (Pet. p. 17)

There is not a scintilla of evidence in the record that any exchange of assets took place. The plain fact is that by the terms of the trust instrument any investment by the trustee could properly be made only after receiving Mrs. Hadcock's consent to such investment. (App. p. 62) The trial court found that she had never given her consent to an investment in Hein-Werner Corporation common stock. (App. p. 46)

Petitioner from the very outset has misconceived his rights in this litigation. The Supreme Court of Wisconsin, in construing the *inter-vivos* trust agreement in question, held that in the making of any new investment the trustee was bound to heed the legal trust fund investment statute. (See *First Wisconsin Trust Company v. Perkins* (1957), 275 Wis. 464, 82 N. W. 2d 331 and App. p. 46.) The Wisconsin Supreme Court did not hold that the trustee was obligated to retain the donor's original investments, i.e., Hein-Werner Corporation common stock, yet it is on this premise that petitioner has based the whole theory of this case.

The circuit court of appeals properly rejected the suggestion of counsel that the trustee was obligated to invest in Hein-Werner Corporation common stock. The circuit court of appeals stated:

"The Trustee Bank was not given unlimited discretion to select assets to fund the $50,000 trust. It was bound by Mrs. Hadcock's right of veto on its selection. Appellant contends that the Trustee Bank failed to exercise any discretion and merely followed the dictates of Mrs. Hadcock. However, in accepting Mrs. Hadcock's suggestion, the Trustee Bank did take action, and in taking such action did exercise its discretion.

"In oral argument appellant's counsel indicated that the Trustee Bank might have compelled Mrs. Hadcock's consent to the selection of the Hein-Werner stock, if the Trustee had chosen to fund the Trust with that stock; by withholding performance of the Trustee's other duties under the Samper Perkins Trust with respect to turning over to Mrs. Hadcock her share of the assets of the Trust. Such extortion of Mrs. Hadcock's consent would have done violence to the Settlor's clear intent."

Appendix A to Pet., p. xi

The plain fact is that the trustee made a new investment in Mrs. Hadcock's promissory note secured by legals or at least so intended. (App. p. 47) Hence, under the Wisconsin Supreme Court decisions the beneficiaries of this trust became entitled to a return on a legal trust fund investment. Everyone has agreed that such an investment has never exceeded five per cent. The district court on competent evidence found:

"The trustee made what it believed was a legal investment, and *it is undisputed that the investment so made exceeded the average yield on legal investments.*"

App. pp. 41-2

It is undisputed that there has never been any depreciation of the trust principal, nor have the beneficiaries

suffered a penny's loss of income from the actual investments made by the trustee.

We have found no case nor has petitioner throughout these proceedings cited us to one holding that a trustee of a legal trust fund investment is guilty of fraud who invests in assets which yield more than legals and who pays all of the income so received to the life income beneficiaries.

Conversely, there are several Wisconsin cases which hold that the mere fact that a trustee fails to invest in securities which qualify under the legal trust investment statute does not render the trustee liable in the absence of proof that the beneficiaries sustained some loss.

> *Guardianship of Farness*, 225 Wis. 383, 273 N. W. 522;
>
> *Estate of George*, 225 Wis. 251, 270 N. W. 538;
>
> *U. S. Fidelity & G. Co. v. Pullen*, 230 Wis. 137, 283 N. W. 462.

See also *Restatement of the Law of Trusts*, Secs. 209-210, pp. 575-577.

In this case the beneficiaries have sustained no loss, either of income or of principal. They attempt to leave the impression in the petition to this Court that the district court found that the Isabel Hadcock note was never secured by legal trust fund investments. (Pet. p. 7) The district court never passed upon the question. (App. p. 39) Whether or not it was so invested became immaterial in the absence of a showing of loss or damage to the beneficiaries of the trust.

It comes as no surprise that petitioner should make extravagant claims in this litigation much the same as was done by these same beneficiaries in an earlier case. (See *Perkins v. Bach*, 350 U. S. 918, 78 S. Ct. 206, 233 F. 2d 251.) But in so doing, petitioner should bear in mind that if the donor intended that these beneficiaries should have the benefit of the yield on Hein-Werner Corporation common stock or on any other specific investment, it was for him to so state in the trust agreement. This the donor did not do.

I

The Trustee Was Bound to Respect the Wishes of Isabel Hadcock in Setting Up the $50,000 Trust.

The Trust Agreement provided in part as follows:

> "10. In making distributions of the Principal of said trust estate, or setting aside any portion of such trust estate as hereinafter directed, the trustee may, in its discretion, appraise and distribute specifically any and all of the securities in which the trust estate shall be invested, or may sell or otherwise convert the same into money, or other securities, and may make such just and equitable distribution and division as in its discretion shall do justice between the parties; this power, however, to be exercised only with the approval and consent of my sister, Mrs. Belle Hadcock, during her lifetime."

If under the terms of the trust agreement a remainderman has power to control the action of the trustee in determining whether the trust should be set up by retaining assets of the settlor or by investing in legal investments, it

is well settled that the trustee is under a duty to act in accordance with the exercise of such power. See *Restatement of Trusts,* Vol. I, sec. 185, page 470.

No Wisconsin Supreme Court case is cited by petitioner that the foregoing is not a correct statement of the law of Wisconsin. No facts were proved at the trial which would require the court to find that Mrs. Hadcock was under a duty to select Hein-Werner Corporation common stock to fund the trust.

Moreover, if the trustee had wanted to set aside Hein-Werner Corporation common stock to fund the trust, Mrs. Hadcock had the power of veto over such selection. But petitioner's intestates have never requested the trustee to make such an investment; nor does the record show that such an investment was ever contemplated prior to the commencement of this action, either by the trustee, the beneficiaries or by Mrs. Hadcock.

No case has been made in the present record which could support a finding that Mrs. Hadcock was estopped from exercising her right of veto, or that she waived such right.

Petitioner's failure to mention in the petition the above quoted clause of the Trust Agreement suggests that it is not readily susceptible to attack.

II.

Petitioner Failed to Prove that the Trustee Exceeded its Investment Powers.

By the terms of the Trust Agreement, Mrs. Hadcock, when the $50,000 trust had been set aside, was entitled to receive the residue of principal and income of the trust fund. (App. p. 64)

Since the residue included as one of its assets the Hein-Werner Corporation common stock, Mrs. Hadcock received the stock and rightfully so.

The only quarrel which petitioner has with the trustee or Mrs. Hadcock is that the $50,000 trust was funded by Mrs. Hadcock's $50,000 collateral note secured by the pledge of assets described in Exhibit 5. (See App. pp. 69-71.) There is no evidence that the collateral described in Exhibit 5 did not meet the legal trust fund requirements of Chapter 320, Wisconsin Statutes. The total collateral requirement was in fact exceeded by $5,564.77.

Contrary to appellant's statements in his petition, neither the district court nor the court of appeals found that the trustee exceeded its limited investment powers (Pet. p. 10), or that the terms of the trust were violated by "exchanging proper trust assets for a reinvestment unauthorized by Wisconsin statute." (Pet. p. 11) The suggestion that there is any basis for such finding is a wholly gratuitous assumption unsupported by a shred of evidence. Again we emphasize that throughout his petition and his brief in the court below, petitioner *assumes* and takes for granted the very facts in issue in the litigation, namely,

that the trustee exceeded his investment powers and the trustee exchanged a proper trust fund investment for an improper one.

We look in vain for any evidence which even remotely tends to prove petitioner's position on these factual issues.

III.

The Transaction of Which Petitioner Complains Was to the Advantage of the Life Income Beneficiaries.

Petitioner has argued throughout these proceedings that the Trustee was not impartial toward the life income beneficiaries because it served in a dual capacity, i.e. as trustee of the trust and as financial agent of Mrs. Hadcock.

It is, of course, undisputed that the trustee received no benefit of any kind from the allegedly wrongful transaction whereby it invested in Mrs. Hadcock's collateral note.

And it is equally clear from the record that Mrs. Hadcock paid as much interest to the trustee as the trustee could have obtained by investing in legal trust fund investments. (It was stipulated by petitioner that the average yield on investments eligible for trust funds under Chapter 320 of the Wisconsin Statutes during the period August 3, 1937 to the date of trial has not exceeded a 5% return.) (See Stipulation of Facts, paragraph X, App. p. 58.) Mrs. Hadcock continuously paid 5% annual interest to the trustee.)

Accordingly, the Circuit Court of Appeals, after reviewing the Wisconsin Supreme Court cases and the facts in evidence, stated as follows:

> "In the case before us, the Trustee Bank clearly satisfied the District Court that the transaction was to the advantage rather than the disadvantage of the A. W. Perkinses as the income paid to them exceeded that which would have been secured had the Trustee Bank funded the trust with assets authorized by the Wisconsin statutes. We have reviewed the evidence and find no error in the District Court's findings on this point."
>
> App. A, p. x

Petitioner has cited no Wisconsin case in point which permits recovery under the facts of this case, i.e., where the investment made is to the advantage rather than the disadvantage of the income beneficiaries and where neither the trustee nor the remainderman have made a penny of profit from the transaction.

IV.

Even if the Obligation to Invest in Legals Had Been Breached, There can be no Recovery in the Absence of a Showing of Damage.

At the time of setting aside the trust fund of $50,000, the trustee did not intend to breach the trust agreement, and as a matter of fact, did not commit a breach of trust involving bad faith. The only breach of trust which can be claimed was a violation of the "proportion" statute, Sec. 320.02, Wis. Stats., for the brief period from June 25, 1940, until May 15, 1943, during which period there was neither loss of income nor depreciation of principal. The alternative remedies which the beneficaries may pursue during that period are as follows:

(1) Either have the trustee account for the trust principal and the income actually received and have the trustee add the money so accounted for to the trust, or

(2) Hold the trustee liable for any deficiency in principal and income as compared with the situation in which the trust would have been had the trustee invested in legals.

In this instance the trustee has accounted for the trust principal and for the income actually received.

Furthermore, there has been no deficiency in principal or income as compared with the situation in which the trust would have been had the trustee invested in legals.

This rule has been applied in Wisconsin where the trustee failed to invest in legals, as follows:

> "The guardian's placing of his ward's funds in the bank on certificates of deposit must be considered as an investment; and he must be held to have breached his duty in not investing them in such securities as the statute required; and he must be required to turn over to the administrator of his ward's estate in cash the amount of the trust certificate *with interest thereon at such rate as the county court shall find trust funds invested in securities such as are prescribed by the statute available under the circumstances would have yielded.*" (Emphasis supplied.) *Guardianship of Uggen,* 224 Wis. 24, 271 N. W. 326.

The corollary to the foregoing rule has been uniformly applied in Wisconsin by its holdings that where the requirement that the trustee invest in legals has been breached, there can be no recovery unless damage is proved.

In *United States F. & G. Co. v. Pullen*, 230 Wis. 137, 142, 143, 283 N. W. 462, a trustee breached the trust by investing in "non-legals." In sustaining the lower court the Supreme Court held:

> "In arriving at those conclusions the court relied upon the rulings of *Guardianship of Farness*, 225 Wis. 383, 273 N. W. 522, and *Estate of George*, 225 Wis. 251, 270 N. W. 538, 274 N. W. 294, to the effect that the mere fact that a fiduciary failed to convert securities into cash and to invest the proceeds in securities specified in sec. 231.32, Stats., does not render him liable for damages in *absence of proof that the trust estate sustained some loss during the period of the fiduciary's administration.*" (Emphasis supplied.)

In *Guardianship of Farness*, 225 Wis. 383, 387, 273 N. W. 522, the court applied the same rule, stating:

> "There is no finding, nor is there any evidence to sustain a finding, that the stock was not worth as much at the time it was tendered to the respondent as it could have been sold for at any time during the period when the guardian should have converted it. It requires no citation of authorities to the proposition that if the ward sustained any loss by reason of any breach of duty on the part of the guardian, the burden of proof to establish such loss was upon the ward.
>
> "The mere fact that the guardian failed to convert the stock into cash and invest the proceeds in securities specified in sec. 231.32, Stats., does not render the guardian liable for damages in the absence of proof that the ward sustained some loss. This she failed to do."

Petitioner does not recognize the equitable remedy which governs this case. In his play for high stakes, he

asks this court to require the trustee to account for profits which it has never made and would only have been made if the trustee had invested in Hein-Werner Corporation stock, an investment which not only required the exercise of discretionary power by the trustee, but the consent of Mrs. Hadcock. The rules do not permit the court to substitute its judgment for that of the trustee.

> "Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion." *Restatement of the Law of Trusts*, Vol. 1, sec. 187.

Plaintiff seeks to gain advantage by punishing the trustee and Mrs. Hadcock because they did not have the foresight which can now be gained by the application of hindsight. The objective of a proceeding in a court of equity is not punitive.

> "The object of award of damages is not to penalize or punish the defendant for a reprehensible act, but to make the plaintiff whole. The cestui should recover only those damages which flow with reasonable certainty from the trustees' breach." *Bogert on Trusts*, Second Ed. (1960), sec. 703, p. 435.

Conclusion

We close by commenting upon the extravagant statements of counsel in his reason No. 2 for granting certiorari.

He states:

> "What the life tenants 'parted with' here was *income from assets earning 'substantially in excess of 5% income,'* (App. 55) and what they 'received' was 5% annual income on $50,000."
>
> (Pet. p. 19)

In reply to this statement we quote the following language from the Circuit Court of Appeals opinion:

> "Appellant's view, however, is that the Trustee Bank, in its capacity as Mrs. Hadcock's financial agent, did physically receive the earnings of the Hein-Werner stock, and then diverted such earnings to Mrs. Hadcock instead of distributing them to the A. W. Perkinses. We cannot agree. The Trustee Bank was not given unlimited discretion to select assets to fund the $50,000 trust. It was bound by Mrs. Hadcock's right of veto on its selection. Appellant contends that the Trustee Bank failed to exercise any discretion and merely followed the dictates of Mrs. Hadcock. However, in accepting Mrs. Hadcock's suggestion, the Trustee Bank did take action, and in taking such action did exercise its discretion.
>
> "In oral argument appellant's counsel indicated that the Trustee Bank might have compelled Mrs. Hadcock's consent to the selection of the Hein-Werner stock, if the Trustee had chosen to fund the Trust with that stock; by withholding performance of the Trustee's other duties under the Samper Perkins Trust with respect to turning over to Mrs. Hadcock her share of the

assets of the Trust. Such extortion of Mrs. Hadcock's consent would have done violence to the Settlor's clear intent."

(Pet. p. xiii-xiv)

Thus it is apparent that petitioner seeks to invoke the jurisdiction of this Court by castigating an opinion which holds squarely in accordance with the rule of the Wisconsin Supreme Court cases cited above that even in the event of breach of trust, the remedy is to require the trustee to turn over the amount which has been placed in investments not permitted by statute with interest at such rate as the trust fund invested in prescribed securities would have yielded.

The trustee has already accounted for principal and income in accordance with the foregoing rule.

The decision of the Court of Appeals is thus clearly in accord with the controlling Wisconsin law. No useful purpose can be accomplished by a further review.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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